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CPLR 214(5): Three-Year Statute of Limitations Applied to Action for Abuse of Process

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Court will opt for an outright application of the grouping of contacts test to the borrowing statute. It is to be hoped that the Court's resolution of this conflict will be free of both the mechanical approach of *Myers* and the ambiguous reasoning of *Martin*.

CPLR 214(5): Three-year statute of limitations applied to action for abuse of process.

Article 2 of the CPLR contains detailed provisions indicating the appropriate statute of limitations applicable to a cause of action in New York. None of these provisions, however, expressly declares which statute of limitations governs an action for abuse of process.³² CPLR 215(3) provides a one-year limitation period for actions based on the intentional torts of assault, battery, false imprisonment, malicious prosecution, defamation, or invasion of privacy.³³ Section 214(5) applies a three-year statute of limitations to any "action to recover damages for a personal injury except as provided in section 215."³⁴ Finally, CPLR 213(1) requires that actions "for which no limitation is specifically prescribed by law" be brought within six years from the accrual of the cause of action.³⁵ Recently, in *Levine v. Sherman*,³⁶ the Supreme Court, Nassau County, in a case of first impression, held that although abuse of process is an intentional tort which would logically fit most neatly among those actions listed in 215(3), the language of the CPLR mandates application of the three-year statute of limitations provided in CPLR 214(5).³⁷

³² Abuse of process is "the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 400, 343 N.E.2d 278, 280, 380 N.Y.S.2d 635, 639 (1975); *accord*, *Hauser v. Bartow*, 273 N.Y. 370, 373, 7 N.E.2d 268, 269 (1937); *Dean v. Kochendorfer*, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924); *Carver Fed. Sav. & Loan Ass'n v. Williams*, 47 App. Div. 2d 834, 835, 365 N.Y.S.2d 563, 566 (2d Dep't 1975). For a discussion of the elements of an action for abuse of process, see note 50 *infra*.

³³ CPLR 215(3) states that a one-year limitation period will be applied to an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law

³⁴ CPLR 214(5).

³⁵ CPLR 213(1). The "usual application [of CPLR 213(1)] is to actions in which equitable relief is sought." 1 WK&M ¶ 213.01 (footnote omitted); see *Ford v. Clendenin*, 215 N.Y. 10, 16, 109 N.E. 124, 126 (1915) (applies to any and every form of equitable action); *Beresovski v. Warszawski*, 28 N.Y.2d 419, 423-25 & n.2, 271 N.E.2d 520, 522-23 & n.2, 322 N.Y.S.2d 673, 675-76 & n.2 (1971) (applies to equitable remedy of specific performance).

³⁶ 86 Misc. 2d 997, 384 N.Y.S.2d 685 (Sup. Ct. Nassau County 1976).

³⁷ *Id.* at 999, 384 N.Y.S.2d at 687. Coincidentally, 10 days after this statute of limitations issue was decided by the *Levine* court as one of first impression, the Supreme Court, New York County, was presented with the same issue in *Brecker v. Groosman*, 175 N.Y.L.J. 123, June 25, 1976, at 6, col. 4 (Sup. Ct. N.Y. County June 24, 1976). The *Brecker* court, after

The *Levine* plaintiff instituted an action for abuse of process almost two and one-half years after the cause of action had accrued.³⁸ Claiming that plaintiff's cause of action was time barred under the one-year statute of limitations for intentional torts, defendant moved to dismiss the complaint. The court rejected defendant's contention, but implicitly conceded that it was not without merit. Justice Harnett acknowledged that CPLR 215(3) lists most intentional torts, including malicious prosecution,³⁹ a tort very similar to abuse of process in that both involve an "improper purpose in the use of legal process."⁴⁰ The court pointed out, however, that the listing of causes of action subject to the one-year limitation period of CPLR 215(3) is exclusive, and abuse of process is "conspicuously absent" from the enumeration of intentional torts therein.⁴¹ Noting that despite the similarity between malicious prosecution and abuse of process they are nevertheless "separately classifiable torts with different composing elements,"⁴² the court declared that even if the omission of abuse of process from CPLR 215(3) was a legislative oversight, "[n]othing gives the court power to add to this list. Only the Legislature can do that."⁴³

Having thus rejected the one-year statute of limitations provided by CPLR 215(3), the court held that abuse of process is a "personal injury" within the meaning of CPLR 214(5), which pre-

first noting that there is no statute of limitations dealing specifically with abuse of process, held that the applicable limitation period is either three years as provided in CPLR 214(4) or CPLR 214(5), or six years pursuant to CPLR 213(1). *Id.*, col. 5. The *Brecker* court, however, did not determine which limitation period is applicable since neither would bar the claim. It held only that an action for abuse of process instituted more than one year after the cause of action has accrued is not time barred by the 1-year limitation period of CPLR 215. *Id.*

³⁸ Plaintiff's action was predicated upon the fact that three actions had been instituted against him to collect the same \$690.20 debt. All three actions were dismissed, final appeal therefrom terminating almost two and one-half years before plaintiff commenced the instant action. The court found that the cause of action accrued on the date the final appeal had been dismissed. 86 Misc. 2d at 998, 384 N.Y.S.2d at 686.

³⁹ *Id.* A malicious prosecution is "one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure." *Burt v. Smith*, 181 N.Y. 1, 5, 73 N.E. 495, 496 (1905); *accord*, *Best v. Genung's Inc.*, 46 App. Div. 2d 550, 552, 363 N.Y.S.2d 669, 670 (3d Dep't 1975); *Watson v. City of New York*, 57 Misc. 2d 542, 545, 293 N.Y.S.2d 348, 353 (N.Y.C. Civ. Ct. N.Y. County 1968).

⁴⁰ *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 400, 343 N.E.2d 278, 281, 380 N.Y.S.2d 635, 639 (1975). The *Farmingdale* Court pointed out that both abuse of process and malicious prosecution "possess the common element of improper purpose in the use of legal process and both were spawned from the action for trespass on the case in the nature of conspiracy." *Id.*

⁴¹ 86 Misc. 2d at 999, 384 N.Y.S.2d at 687.

⁴² *Id.*

⁴³ *Id.*

scribes a three-year limitation period for all personal injury actions not governed by CPLR 215. Justice Harnett felt that this result was mandated by section 37-a of the General Construction Law, which defines "personal injury" as including defamation, malicious prosecution, assault, battery, false imprisonment, "or other actionable injury to the person."⁴⁴ Unlike the list of intentional torts in CPLR 215(3), the enumeration of actions within the definition of a personal injury was found to be nonexclusive. Accordingly, the court held that abuse of process fits squarely within the statutory framework of CPLR 214(5) rather than the catch-all provision of section 213(1).

It is submitted that the court properly held the language of CPLR 215(3) to create a "closed set,"⁴⁵ not amenable to judicial expansion. This holding clearly follows the general rule of statutory construction that the inclusion of one thing implies the exclusion of the other.⁴⁶ Thus, the specific listing of torts in CPLR 215(3) necessarily implies the exclusion of all others, and, therefore, CPLR 215(3) should not be deemed to incorporate the unlisted tort of abuse of process.

There is also substantial support for the court's finding that abuse of process is a "personal injury" within the ambit of CPLR 214(5). It has been repeatedly held that the term personal injury is to be interpreted broadly and is not limited to physical contact.⁴⁷ Indeed, the term has been found to include "every variety of injury to a person's body, feelings or reputation."⁴⁸ Since abuse of process usually involves coercion,⁴⁹ it is clear that some degree of personal

⁴⁴ N.Y. GEN. CONSTR. LAW § 37-a (McKinney 1951) (emphasis added). In so holding, the *Levine* court rejected the contention that the controlling statute of limitations is CPLR 213(1). That section mandates that actions "for which no limitation is specifically prescribed by law" must be commenced within six years after the cause of action accrues. In practice, CPLR 213(1) is primarily utilized when the cause of action sounds in equity. See note 35 *supra*.

⁴⁵ 86 Misc. 2d at 999, 384 N.Y.S.2d at 687.

⁴⁶ See, e.g., *Collins v. National Aniline Div., Allied Chem. & Dye Corp.*, 8 App. Div. 2d 900, 186 N.Y.S.2d 979 (3d Dep't 1959) (mem.) (list of injurious chemicals in Workmen's Compensation Law implies exclusion of injurious chemicals not listed); *Uline v. MVAIC*, 28 Misc. 2d 1002, 1004, 213 N.Y.S.2d 871, 874 (Sup. Ct. Saratoga County 1961).

⁴⁷ E.g., *Riddle v. MacFadden*, 201 N.Y. 215, 94 N.E. 644 (1911) (unauthorized use of one's name or portrait is a personal injury); cf. *Rolnick v. Rolnick*, 55 Misc. 2d 243, 284 N.Y.S.2d 908 (Sup. Ct. Nassau County 1967), *rev'd mem. on other grounds*, 29 App. Div. 2d 987, 290 N.Y.S.2d 111 (2d Dep't 1968), *aff'd mem.*, 24 N.Y.2d 805, 248 N.E.2d 442, 300 N.Y.S.2d 586 (1969).

⁴⁸ *Bonilla v. Reeves*, 49 Misc. 2d 273, 279, 267 N.Y.S.2d 374, 381 (Sup. Ct. N.Y. County 1966) (interference with right to sepulcher is personal injury).

⁴⁹ See *Pagliarulo v. Pagliarulo*, 30 App. Div. 2d 840, 293 N.Y.S.2d 13 (2d Dep't 1968)

injury is involved.

Despite the court's thorough reasoning and apparent accuracy, the *Levine* decision has at least one unfortunate aspect. The court's holding may be viewed as logically inconsistent with the statutory scheme of limitation periods inasmuch as it applies a three-year statute of limitations to abuse of process, whereas malicious prosecution, an intentional tort closely analogous to abuse of process, is governed by a one-year statute of limitations. Although the two actions are distinguishable in that their respective elements are not identical,⁵⁰ it is difficult to justify the application of different statutes of limitations. The major reason for the comparatively short one-year limitations period applied to malicious prosecution is that its perpetration is "known promptly to the person injured."⁵¹ Since the abuse of process tort usually involves coercion,⁵² its perpetration will similarly be readily apparent.

(mem.) (cause of action for abuse of process lies where it is alleged that process was used to compel plaintiff, by means of fear, to meet defendant's demands); W. PROSSER, LAW OF TORTS § 121, at 857 (4th ed. 1971).

⁵⁰ An action for malicious prosecution is based on the unlawful commencement of a cause of action, see note 39 *supra*, and consists of three basic elements. First, there must be malice on the part of the party who brought the action. *Vennard v. Sunnyside Sav. & Loan Ass'n*, 44 App. Div. 2d 727, 354 N.Y.S.2d 446 (2d Dep't 1974) (mem.). The element of malice required in an action for malicious prosecution may be inferred from a showing that the defendant acted with "wanton, reckless or grossly negligent disregard of the plaintiff's rights, inconsistent with good faith." *Biener v. City of New York*, 47 App. Div. 2d 520, 521, 362 N.Y.S.2d 563, 567 (2d Dep't 1975) (mem.) (citations omitted); accord, *Watson v. City of New York*, 57 Misc. 2d 542, 548, 293 N.Y.S.2d 348, 356 (N.Y.C. Civ. Ct. N.Y. County 1968). Second, there must be a lack of reasonable cause to believe that the action could succeed. *Burt v. Smith*, 181 N.Y. 1, 5-6, 73 N.E. 495, 496 (1905); *Best v. Genung's Inc.*, 46 App. Div. 2d 550, 552, 363 N.Y.S.2d 669, 670 (3d Dep't 1975). Lastly, the action must terminate in favor of the defendant. *Burt v. Smith*, 181 N.Y. 1, 5, 73 N.E. 495, 496 (1905).

An action for abuse of process, on the other hand, is based on misuse of process which has been legally issued, see note 32 *supra*, and requires a showing that the process was in fact used for a purpose outside of the one for which it was issued, *Dean v. Kochendorfer*, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924). The elements of an action for abuse of process are: (1) regularly issued process; (2) harmful intent on the part of the person who caused the process to be issued; (3) use of the process to achieve "some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process." *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 403, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 642 (1975). It should be noted that the mere existence of a malicious motive for the use of process does not constitute abuse of process; the process must be used for other than that for which it was intended. *Bohm v. Holzberg*, 47 App. Div. 2d 764, 365 N.Y.S.2d 262 (2d Dep't 1975) (mem.).

The main distinction between the two causes of action is that an action for abuse of process arises from the improper use of process after it has been issued, whereas an action for malicious prosecution lies as a result of the defendant causing process to unlawfully issue. *Assets Collecting Co. v. Myers*, 167 App. Div. 133, 138, 152 N.Y.S. 930, 933 (1st Dep't 1915).

⁵¹ SECOND REP. at 73.

⁵² See note 49 *supra*.

This criticism, however, is more properly addressed to the legislature than the courts. It is submitted that CPLR 215(3) should be amended to include abuse of process among the intentional torts subject to a one-year statute of limitations. Until such an amendment is forthcoming, however, the *Levine* court's application of a three-year period is the proper result.

ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 303: Counterclaim by Seider-predicated third-party Dole defendant does not constitute commencement of an action.

CPLR 303 provides that the commencement of an action in New York by a person not otherwise amenable to personal jurisdiction exposes the plaintiff to full in personam jurisdiction in any action brought by a party to the original action which "would have been permitted as a counterclaim had the action been brought in the supreme court."⁵³ Thus, a nonresident who commences an action in New York assumes the risk that a party to the action may assert a claim against him, for which, pursuant to CPLR 303, he is subject to full in personam jurisdiction.⁵⁴ Recently, in *Green v. Bender*,⁵⁵ the Supreme Court, Westchester County, was confronted with the novel question whether a *Seider*-predicated⁵⁶ third-party

⁵³ CPLR 303.

⁵⁴ See 1 WK&M ¶ 303.01.

⁵⁵ 175 N.Y.L.J. 115, June 15, 1976, at 11, col. 5 (Sup. Ct. Westchester County).

⁵⁶ In *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), the Court of Appeals held that a nondomiciliary may be brought within the jurisdiction of the New York courts by attachment of his automobile liability insurance policy if his insurer is present in this state. The Court reasoned that because the insurer had an obligation to the insured to defend and indemnify him to the extent of the insurance policy limits, a "debt" existed which was subject to attachment. The *Seider* decision was reconsidered and reaffirmed in *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), wherein the Court declared that a *Seider*-predicated defendant is entitled to make a limited appearance whereby his liability cannot exceed the limits of his insurance policy. *Id.* at 310, 234 N.E.2d at 671, 287 N.Y.S.2d at 636-37. See also *Bertucci v. Red Top Sedan Serv., Inc.*, 48 App. Div. 2d 677, 368 N.Y.S.2d 236 (2d Dep't 1975) (mem.); *Seligman v. Tucker*, 46 App. Div. 2d 402, 362 N.Y.S.2d 881 (4th Dep't), *motion for leave to appeal dismissed*, 36 N.Y.2d 921, 335 N.E.2d 844, 373 N.Y.S.2d 536 (1975) (mem.); *Tjepkema v. Kenney*, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't) (mem.), *motion for leave to appeal dismissed*, 24 N.Y.2d 740, 250 N.E.2d 68, 302 N.Y.S.2d 1025 (1969). The right to a limited appearance has been codified in CPLR 320(c)(1), which provides for a limited appearance where quasi-in-rem jurisdiction has been obtained over a defendant by virtue of attachment of his property within the state. As supplemented by *Simpson*, *Seider* has withstood constitutional attack in the federal courts. See *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969). For an analysis of the constitutional issues presented in *Seider*, see Note, *Seider v. Roth: The Constitutional Phase*, 43 ST. JOHN'S L. REV. 58 (1968).